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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

OMAR RODRIGUEZ; CINDY GUILLEN-
GOMEZ; STEVE KARAGIOSIAN;
ELFEGO RODRIGUEZ; AND JAMAL
CHILDS,

Plaintiffs,

-vs-

BURBANK POLICE DEPARTMENT;
CITY OF BURBANK; TIM STEHR;
KERRY SCHILF; JAMIE "J.J." PUGLISI;
DAN YADON; KELLY FRANK; PAT
LYNCH; MIKE PARRINELLO; AARON
KENDRICK; DARIN RYBURN; AND
DOES 1 THROUGH 100, INCLUSIVE.

Defendants.

CASE NO: BC 414602

[Assigned to Hon. Joanne O'Donnell,
Dept. 37]

**DEFENDANT'S REPLY IN
SUPPORT OF MOTION *IN LIMINE*
NO. 5 FOR AN ORDER EXCLUDING
EVIDENCE OF OR ARGUMENT
RE: ALLEGED PROFILING OF
ARMENIAN CITIZENS OR
SUSPECT**

Trial Date: June 8, 2011 (Pltf. Karagiosian)
Discovery Referee: The Hon., Diane Wayne, Ret.

Action filed: May 28, 2009

I. **ALLEGED DISCRIMINATION AGAINST NON-EMPLOYEES IS NOT PROBATIVE OF PLAINTIFF'S CLAIMS OF ETHNIC HARASSMENT BY FELLOW EMPLOYEES.**

None of the cases cited in Plaintiff's Opposition support his attempt to use alleged discrimination against non-employees in the issuance of traffic citations as evidence of ethnic harassment of an employee in violation of FEHA. *None* of the California cases he cited held that harassment of members of the public amounted to harassment under FEHA; *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 287-291 ("sexual antics" that "did not involve and were not aimed at plaintiff *or any other female employee*" held insufficient to support claim of sexual harassment)(Emphasis added.); *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 515, 519 (*affirming* exclusion of evidence of sexual harassment of others but acknowledging "a reasonable person may be affected by knowledge that *other workers* are being sexually harassed in the workplace")(emphasis added). The same is true of the federal cases cited in the Opposition. See, *Meritor Sav. Bank FSB v. Vinson* (1986) 477 US 57, 60 (alleged harasser "touched and fondled other women *employees* of the bank")(Emphasis added.); *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1117 (harassment of white *co-worker* who was friends with African-American employee).

While there are no published California cases dealing with the relevance of alleged harassment of non-employees in the context of an employee's claims under FEHA, there are a number of federal court cases holding that alleged harassment of non-employees did *not* support claims under Title VII. See, e.g., *Crowley v. Prince George's County* (4th Cir. 1989) 890 F.2d 683, 687 (dismissing a claim for retaliation based on "investigating instances of racial harassment perpetrated by police officers against members of the community" because the discrimination was not in the employment context); *Ashcraft v. Beicker* (D. Colo. 2008) 2008 U.S. Dist. LEXIS 18397, *16 (alleged sexual harassment of deputy's non-employee wife); *Neely v. City of Broken Arrow* (N.D. Okla. 2007) 2007 U.S. Dist. LEXIS 39256, *10 (alleged sexual harassment of civilians by firefighters). In *Neely*, the court stated:

1 "Harassment of members of the public, however vulgar and
2 inappropriate, is not covered by Title VII. Title VII makes it
3 unlawful for an employer to engage in discriminatory
4 employment practices. *It does not prohibit every claim of
discrimination against an employer -- even claims based on
sex, race, or another protected category -- when the
discrimination claim does not relate to an employment
practice.*"

5
6 *Neely, supra*, at *10.

7 **II. ALLEGED "PROFILING" AS TO TRAFFIC ENFORCEMENT IS NOT**
8 **RELEVANT TO PLAINTIFF'S "FAILURE TO PREVENT" CLAIM**

9 Plaintiff argues that he needs the to present evidence of "profiling" of Armenians for
10 traffic citations to disprove Burbank's "avoidable consequences" defense, and to prove his
11 claim that Burbank failed to "take all reasonable steps to prevent harassment from
12 occurring." (Gov. Code § 12940(j)(1), (k).) However, alleged "profiling" of Armenian
13 members of the public is *not* relevant for either of these purposes. There is no suggestion
14 that there was ever a complaint made about the alleged profiling or that, if such a complaint
15 was made, it was not properly investigated. Moreover, it has nothing to do with BPD's
16 *employment practices* in regards to employee complaints of harassment in the workplace.
17 Moreover, allowing this evidence would necessitate a "mini-trial" on the issue of
18 discriminatory traffic enforcement and the admission of substantial additional evidence
19 which will substantially lengthen the trial.

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Moreover, in order to prevail on his claim for failure to prevent harassment, Plaintiff would have to prove "*legal causation*" and *resultant damages* – i.e., that *he* was subjected to actionable harassment as a result of any failure to prevent harassment. *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286-87. Plaintiff has offered no theory as to how the acts of harassment he claims were directed at him were the result of "profiling" of Armenian members of the public.

DATED: 6/6/11

BALLARD ROSENBERG GOLPER & SAVITT, LLP

By: 

PHILIP E. REZNIK

Attorneys for Defendant
CITY OF BURBANK, including the Police Department
of the City of Burbank

PROOF OF SERVICE

I am a citizen of the United States, and am employed in the County of Los Angeles in the office of a member of the bar of this Court at whose directions this service was made. I am over the age of 18, and not a party to the within action. My business address is Ballard, Rosenberg, Golper & Savitt, 500 North Brand Boulevard, Twentieth Floor, Glendale, California 91203-9946.

On June 6, 2011, I served the foregoing document described as: **DEFENDANT'S REPLY IN SUPPORT OF MOTION *IN LIMINE* NO. 5 FOR AN ORDER EXCLUDING EVIDENCE OF OR ARGUMENT RE: ALLEGED PROFILING OF ARMENIAN CITIZENS OR SUSPECT** on the interested parties in this action, by placing a true copy thereof in a sealed envelope addressed as follows:

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VIA FACSIMILE; and

 X

(BY FEDEX) I am "readily familiar" with the firm's practice of collection and processing correspondence for delivery by Federal Express. Under that practice, in the ordinary course of business, it would be deposited with Federal Express on that same day with directions for next day delivery, with the Federal Express fees guaranteed to be paid by Ballard, Rosenberg, Golper & Savitt, LLP.

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(BY ELECTRONIC MAIL) I sent the above-mentioned documents via electronic mail addressed as set forth above.

 (BY PERSONAL SERVICE) I delivered such envelope(s) by hand to the above-addressee(s).

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on June 6, 2011 at Glendale, California.


Leslie Reheis